they were owned before their land was raped by the coal companies. They no longer have either the use or the enjoyment of their property and its value is greatly diminished. For all practical purposes, the result is the same as if the land had been physically taken from them. The only logical conclusion is that strip mining per se constitutes a taking without compensation within the meaning of the Fifth Amendment.

CONCLUSION

The Watsons have demonstrated that this Court should grant certiorari to review these serious and important issues that not only affect them but also reach hundreds of citizens of western Kentucky and may perhaps affect the lives of other citizens in other states in the near future.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 73-2234

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MITCHELL WATSON, MENIFEE WATSON, IDA MAE MULLINS, JUDGE WATSON, OLGA WATSON, NANILEA ROWE AND RANDOLPH WATSON *Plaintiffs-Appellants*

versus

KENLICK COAL COMPANY, INC., TIP TOP COAL COMPANY, INC., SHERMAN BAILEY, LEXIE BAILEY, J. W. HOWARD AND FLORENCE HOWARD *Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed June 21, 1974

Before PHILLIPS, Chief Judge, MILLER and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. Plaintiffs-Appellants ("the Watson family" or "the Watsons") claim that the destruction of surface rights in land owned by them incident to past and prospective strip mining by the defendants-appellees is actionable under 42 U.S.C. §1983. They sue for an injunction and damages. Specifically, the Watson family contends that appellees, who admittedly own the minerals in, on and under the Watson land, are acting under color of state law and depriving them of their property without due process and just

compensation, all in violation of the Fourteenth and Fifth Amendments.

District Judge H. David Hermansdorfer, finding no state action or constitutional deprivation, dismissed the complaint for lack of subject matter jurisdiction. His decision is reported at 365 F.Supp. 456 (E.D. Ky. 1973). We affirm.

The Watsons are private citizens who own the surface rights to certain land located in Magoffin County, Kentucky. Defendants-appellees, the Howards, are private citizens who own the minerals, including coal, in, on and under the land. The Howards derived their rights as remote successors in interest of a mineral severance grant or deed from the former owners-predecessors of the title to the Watsons. Defendants-appellees, the Kenlick Coal Co., Inc. and the Tip Top Coal Co., Inc., are lessees who engage in strip mining the land. Defendants-appellees, the Baileys, are officers of the coal companies.

The gravamen of the complaint is that the appellees, without the Watsons' consent, have been strip mining the land; and that these strip mining operations have resulted in the destruction of the Watsons' surface rights in the land and constitute a denial of due process and a taking of the land without just compensation. State action is premised upon the issuance of permits to strip mine by the Division of Reclamation, a division of the Kentucky Department of Environmental Protection, or, in the alternative, upon decisions of the Court of Appeals of Kentucky in unrelated cases.

A prerequisite to the vesting of federal jurisdiction for an alleged wrong under §1983 is the deprivation of a right guaranteed by the Constitution and laws of the United States. Such deprivation must be "under color of law." There must be state action. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 152, n. 7 (1970); *United States* v. *Price*, 383 U.S. 787, 794 n. 7 (1966). We find neither a constitutional deprivation nor state action.

Appellees have been strip mining the Watsons' land under authority of a "broad form" deed executed in 1905. The deed, which included a waiver of damages, severed the mineral rights from the surface estate thereby creating two distinct estates in the land by conveying the rights to:

> "all coal minerals and mineral substances and products; all oils and gases; all salt and salt mineral waters; all fire and potters clay; all iron and iron ores; all stone; all slate; all ores and mines; and all subterranean substances and products; and all combinations of same, or any or all of the same; situated, lying and being in, on or under the hereinafter described land, or that may hereafter be found thereon, therein or thereunder; and such of the standing timber thereupon as may, at any time of the use thereof, be, or by the party of the second part, its successors or assigns, be deemed necessary or convenient for mining purposes, or so deemed necessary or convenient for the exercise and enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed, including timber necessary for dams and railroads, or branch lines thereof, as may hereafter be constructed upon the said lands; and the exclusive rights-of-way for any and all railroads, tram roads, haul roads and other ways, pipe lines, telephone and telegraph lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives or assigns, or by the party of the second part, its successors or assigns, or by any person or corporation with or without the authority of either of said parties, their, or its heirs, representatives, successors or assigns; and also the right to maintain, keep in repair and operate the same and said railroads, tram roads, haul roads, ways, pipe lines, telephone and telegraph lines; and also the exclusive right to enter upon said land and drill thereupon for oil and gas, and to pump for and store the same upon said land, and remove pipe and transport the same therefrom; and to use and operate the said land and surface thereof and any and all parts thereof, including the right to use, divert, dam and pollute water

courses thereon in any and every manner that may, by party to the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, sold, granted or conveyed, including, but not limiting to, that of drilling, mining, pumping and therefrom removing or otherwise utilizing the said pipe, telegraph and telephone lines, rights-of-way, roads, ways, timber, coal, minerals, slate, oil, gas, salt water, clay, iron ore, mines, stone and subterranean substances and products thereof, and any and all other property and rights hereby bargained, sold, granted or conveyed, and for the transportation therefrom of said articles; and also the right to build, erect, alter, repair, maintain and operate upon said land, and at its option to therefrom remove, any and all houses, shops, buildings, tanks, derricks, inclines, tipples, dams, coke-ovens, store and ware rooms, and machinery and mining and any and all equipment, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, granted, sold or conveyed; and the right to thereupon convert, reduce, refine, store, dump and manufacture the said, or any or all of said property or products, in, upon or under said land, or other land owned, or hereafter acquired by said party of the second part, its successors or assigns, by purchase, lease or otherwise; and the right to dump, store and leave upon said land any and all muck, bone, shale, water or other refuse from said mines, wells, ovens or houses; and any and all matters and products that may be excavated from mines or produced by the exercise or enjoyment of any or all the property, rights and privileges hereby bargained, sold, granted or conveyed; and the right to remove all pillars and other lateral and subjacent supports without leaving pillars to support the roof or surface; and the

right to use said land for removal or storage of the products taken out of any other land owned, or hereafter acquired by party of the second part, its successors or assigns by lease or otherwise; and the right to erect upon said land and maintain, use, repair and operate, and at their pleasure remove therefrom, any and all buildings and structures, and machinery and mining and any and all equipment, whether specifically enumerated herein or not, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the exercise or enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed; and also the free access to, upon and over said land for the purposes of surveying and prospecting for said property and interests."

The Court of Appeals of Kentucky has held that a "broad form" deed gives the mineral owner the right to strip mine and subjects him to liability only if he exercises that right wantonly, oppressively, maliciously or arbitrarily. *See, e.g., Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395, 399 (1968); *Croley* v. *Round Mountain Coal Co.*, 374 S.W.2d 852, 854 (1964); *Blue Diamond Coal Co., Inc.* v. *Campbell*, 371 S.W.2d 483, 485 (1963); *Ritchie* v. *Midland Mining Co.*, 347 S.W.2d 548 (1961); *Kodak Coal Co.* v. *Smith*, 338 S.W.2d 699, 701 (1960); *Blue Diamond Coal Co.* v. *Neace*, 337 S.W.2d 725, 728 (1960); *Bevander Coal Co.*, v. *Matney*, 320 S.W.2d 301, 302 (1959); *Buchanan* v. *Watson*, 290 S.W.2d 40, 43 (1956).

The Watsons contend that this interpretation of the deed by the Kentucky Court of Appeals so as to authorize strip mining on their property has denied them due process and constitutes a taking without compensation because: 1) The Court retroactively has expanded and enlarged the mineral owner's rights under the deed; 2) the Court has given the coal miners a privileged position to the detriment of the surface

owners; and 3) the deed does not specifically authorize strip mining, and, indeed, strip mining was not contemplated at the time the mineral rights were conveyed.

As support for their argument that the Court of Appeals of Kentucky unconstitutionally has enlarged the rights conveyed by a "broad form" deed, appellants rely on *West Kentucky Coal Co.* v. *Dilback*, 219 Ky. 783, 784, 294 S.W. 478, 479 (1927), wherein the Court stated:

> "As we have said, the right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil, and this right of support is absolute and not dependent upon any question of negligence."

We fail to see how this case, which recites the general rule, lends support to the argument of the Watson family. The Watsons have assumed that they had rights under the "broad form" deed which were subsequently destroyed by decisions of the Court of Appeals of Kentucky. This assumption completely sidesteps the threshold question in this case, that is, did the Watsons' predecessors in title give up the rights that the Watsons now complain have been taken from them. Thus, the success of the Watsons' case depends on whether they possess rights under the deed which they complain have been taken from them. Under the common law of Kentucky, the predecessors in title to the Watsons gave up the right to prevent the appellees from strip mining.

The question of the rights and liabilities under a grant or deed is a question of state property law of which the federal courts can have no concern unless there is a violation of the Constitution or laws of the United States. *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927); *Tracy* v. *Ginzberg*, 205 U.S. 170 (1907). *Accord Evans* v. *Abney*, 396 U.S. 435, 439, 443-44 (1970). Absent an actionable violation, it is not the role of the federal judiciary to act as a super-

legislature by setting aside the property law of a state simply because we might consider the law to be unwise or harsh. To do so would constitute an abdication of the responsibility of federal judges "to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." 396 U.S. at 447. *See also North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). As stated by Mr. Justice Harlan in *Tracy, supra:*

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property with due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown

not to have unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'" 205 U.S. at 178.

These same principles were reaffirmed in *American Railway Express Co., supra,* wherein the Court stated:

> "The Kentucky court had jurisdiction and has determined only that under common law principles in the peculiar circumstances above narrated, where the facts were or might have been known to the purchasing corporation it became liable for claims against the vendor resulting from transactions within the State. The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' *Pennoyer* v. *Neff,* 95 U.S. 714, 733; *Booth* v. *Illinois,* 184 U.S. 425, 429; *Truax* v. *Corrigan,* 257 U.S. 312, 329.
>
> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning,* 118 U.S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa,* 160 U.S. 389, 393; *Tracy* v. *Ginzberg,* 205 U.S. 170, 177; *Bonner* v. *Gorman,* 213 U.S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.,* 233 U.S. 665, 669." 273 U.S. at 273.

More recently, in *Evans, supra,* the Supreme Court addressed itself to this question of federal interference with state law. *Evans* was a case where the Supreme Court of Georgia had terminated a trust that had established a park open only to whites. The intent of the testator had been

specific in that only whites were allowed to use the park. The Georgia *cy pres* doctrine would not allow the Georgia courts to reform the trust, but rather would give effect to the desire of the testator to have the trust terminated instead of integrating the park. The Supreme Court affirmed, noting that there was no violation of any constitutionally protected rights because both whites and non-whites had been deprived of the use of the park. The effect of this decision, however, was to uphold state law that enforced clearly discriminatory provisions of a trust agreement. Justice Black, speaking for the Court, stated:

> "We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. 396 U.S. at 439.
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> * * *
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> "Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will. 396 U.S. at 444.
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> * * *
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> "The construction of wills is essentially a state-law question, *Lyeth* v. *Hoey*, 305 U.S. 188 (1938), and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs. *Id.*
>
> * * *

"In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. 396 U.S. at 445.

* * *

"What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust." 396 U.S. at 446.

We think the above quotations from *Evans, supra,* are equally applicable to the question presented in this case and reaffirm those principles set forth in *Tracy* and *American Railway Express Co., supra.* It is with these considerations in mind that we must examine alleged constitutional deprivation asserted by the Watson family.

Apparently, it is contended that the Court of Appeals of Kentucky has an improper motive with respect to mining deeds. The Watsons, in effect, argue that the Court has given the coal mining industry a privileged position in derogation of

the rights of surface owners. Reliance is placed upon *Wiser Oil Co.* v. *Conley*, 346 S.W.2d 718 (1960), wherein the Court refused to interpret an oil lease so as to authorize the surface destructive "water flooding" method of oil recovery to increase oil production. In that case the Court concluded that "it was the intention of the parties that oil be produced by drilling in the customary manner that prevailed when the lease was executed." 346 S.W.2d at 721-22. Appellants contend that the broad form deed should be interpreted so as to prohibit strip mining because it was not the customary manner of mining at the time the deed was executed. Indeed, it may not have been known at that time. By conclusory reasoning, the Watsons allege that but for the coal mining industries' privileged position, the deed would have been interpreted so as to exclude strip mining.

We do not find this argument to be persuasive. At least one distinction between *Wiser* and the strip mining cases is the deed itself. The broad form deed is a thorough denunciation of surface rights and, unlike *Wiser*, expressly includes a waiver of damages. Such a distinction, although the result may be considered to be harsh, does not show any improper motive on the part of the Court of Appeals of Kentucky.

Neither do we find that the Kentucky court was doing anything more than applying traditional concepts of deed construction that were neutral and of long standing. This is evidenced in *Buchanan* v. *Watson*, 290 S.W.2d 40 (1956), which was the first case significantly to interpret the broad form deed. The Court noted that the deed conveyed all of the coal in, on and under the land, did not contain any limitations or prohibitions on the method to be used to extract it, and contained an express waiver of damages. These considerations led the Court to conclude that the surface estate was subservient to the mineral estate. Applying the fundamental rule for deed construction that any ambiguity was

to be construed most strongly against the grantor and in favor of the grantee, the Court held that the deed authorized strip mining and would only allow damages if the right were exercised arbitrarily, wantonly or maliciously, *Id.* at 42-43.

The Watsons contend that a broad form deed could not authorize strip mining because "it is inconceivable that the surface owners would have authorized the destruction of their land." Additionally, much emphasis is placed upon the fact that, apparently, no other jurisdiction has interpreted a broad form deed so as to permit strip mining.

We do not find it helpful to the position of the Watsons that no other state court has interpreted a broad form deed to allow strip mining. Property law is, and must be, a creature of state law, with peculiar nuances in each jurisdiction. The rule in these strip mining cases evolved through custom and usage that were peculiar to Kentucky law and history. It is only when these rules are arbitrary or capricious or in clear conflict with fundamental principles of jurisprudence that a federal court may act. *American Railway Express Co., supra,* 273 U.S. at 273; *Tracy, supra,* 205 U.S. at 178. We are unwilling so to characterize the decisions of the Court of Appeals of Kentucky.

The recent case of *Martin* v. *Kentucky Oak Mining Co.,* 429 S.W.2d 395 (1968), shows the great extent to which the Court of Appeals of Kentucky has relied on historical data to interpret a broad form deed and fathom the intent of the parties. The deed in *Martin* was also executed in 1905 and dealt with land in Knott County, a county contiguous with Magoffin. The Court stated: "Of course in endeavoring to find the intent of the parties we must consider the situation and circumstances existing when the deeds were made." 429 S.W.2d at 397.

This court, in *Peabody Coal Co.* v. *Pasco,* 452 F.2d 1126, 1132 (6th Cir. 1971), said with reference to the decision of the Kentucky Court in *Martin*:

"The court then considered some of the circumstances attending the execution of the 'broad form' deed involved. It was noted that in 1900 only 17 per cent of the land in Knott County, where the subject property was located, was improved agricultural land. Much of the *Martin* tract was hillside land and of no productive value. The court weighed these facts against the argument that no farmer would intend that his *fields* be destroyed by mining operations. Also considered was the fact that in 1900 the average value per acre of land in Knott County was $2.90 while in 1905 only the mineral rights to the *Martin* tract were purchased for $3.00 per acre. The court apparently considered the evidence that the full value of the land had been paid to the grantor in evaluating the possibility that the original grantor in fact intended to convey the complete use of the surface and to retain bare title for whatever value it may have. Another circumstance mentioned was the fact that even in 1905 there were potential sources of damage to the land from customary deep mining methods. A final consideration examined by the court was that under a 'broad form' deed the surface owner reserved use of the land for agricultural purposes only to the extent that such use was consistent with the rights of the mineral owner. The court considered this factor as evidence that agricultural values were subordinated to mineral values. After considering the particular circumstances surrounding the execution of the *Martin* deed and the particular language of that deed the court held that 'the mineral owner bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals.' 429 S.W.2d at 399."

We hold that the Court of Appeals of Kentucky did nothing more than apply well settled general principles of Kentucky law to interpret a Kentucky deed. This law is neutral and there is not the slightest indication that the Court was motivated by any improper motive or that broad

form deeds were treated in a manner different from other deeds. Nor has the Court of Appeals of Kentucky exercised its power arbitrarily or capriciously or in a manner that would offend fundamental principles of jurisprudence.

The second prerequisite for federal jurisdiction is that the alleged deprivation be committed under color of law. The Watsons contend that Kentucky's environmental laws and regulations are sufficient to constitute the necessary degree of state involvement. In the alternative, they argue that the decisions of the Court of Appeals of Kentucky interpreting the broad form deed in unrelated cases are state action.

Kentucky has regulated extensively the environmental aspects of strip mining. Kentucky Revised Statutes, Ch. 350. The Department of Environmental Protection and its Division of Reclamation are charged with the responsibility of enforcing these laws. K.R.S. 350.020. The purpose of these laws is best shown in the "Declaration of legislative policy and finding of fact," K.R.S. 350.020, which states:

> "The general assembly finds that the unregulated strip mining of coal causes soil erosion, damage from rolling stones and overburden, landslides, stream pollution, the accumulation of stagnant water and the seepage of contaminated water, increases the likelihood of floods, destroys the value of land for agricultural purposes, destroys asthetic values, counteracts efforts for the conservation of soil, water and other natural resources, destroys or impairs the property rights of citizens, creates fire hazards, and in general creates hazards dangerous to life and property, so as to constitute an immiment and inordinate peril to the welfare of the commonwealth. The general assembly further finds that lands that have been subjected to strip mining and have not been reclaimed and rehabilitated in accordance with modern standards constitute the aforementioned perils to the welfare of the commonwealth. The general assembly further finds that there are wide

> variations in the circumstances and conditions surrounding and arising out of the strip mining of coal due primarily to difference in topographical and geological conditions, and by reason thereof it is necessary, in order to provide the most effective, beneficial and equitable solution to the problem, that a broad discretion be vested in the authority designated to administer and enforce the regulatory provisions enacted by the general assembly. Therefore, it is the purpose of this chapter to provide such regulation and control of the strip mining of coal as to minimize or prevent its injurious effects on the people and resources of the commonwealth. To that end, the division and the department are directed to rigidly enforce this chapter and to adopt whatever regulations are found necessary to accomplish the purpose of this chapter."

Pursuant to statutory authorization, K.R.S. §350.060, strip miners are required to obtain permits to mine. In order to obtain a permit, the miners are required to submit, *inter alia*, plans or proposals showing the method of operation, the manner, time and distance for backfilling, grading work and a reclamation plan for the affected area. These plans must meet the minimum requirements of the laws and regulations. Moreover, Chapter 350 provides a full spectrum of mechanisms so as to insure compliance with its provisions.

Apparently conceding that the state action cannot, in this case, be premised on a partnership, governmental function or entwinement theory, the Watson family seeks to rely on an "encouragement" theory and contends that the state's issuance of permits to strip mine is sufficient state action to support federal jurisdiction. Principal reliance is placed on *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). The Watsons contend that when state regulations are aimed directly at the harm complained of, and not peripheral aspects, there is significant state action. Thus, it is argued

that the strip mining regulations are directed at the destructive aspects of strip mining and have the effect of encouraging and approving these practices. We find this argument to be without merit.

Moose Lodge, supra, was a case wherein the policy of a private club was to discriminate against blacks. The plaintiff in that case had alleged that such discrimination was under color of state law because the state of Pennsylvania licensed Moose Lodge to serve liquor. After reviewing the concept of "state action" and admitting that it "frequently admits of no easy answer," the Court went on to analyze the degree of involvement of Pennsylvania with the Moose Lodge. 407 U.S. at 172, 175-77. The Court noted that Moose Lodge was a private club situated on private property and was not publicly funded *Id.* at 171. The state licensing board could require the club to make physical alterations, required the club to file a list of the names and addresses of its members and employees and also required the keeping of extensive financial records. Finally, the board was granted the right to inspect the premises. *Id.* at 176. With this pervasive scheme of regulations, the Supreme Court found no state action because the regulations, regardless of how detailed they might be, did not in any way foster or encourage discrimination, nor was the state a partner or joint venturer in the enterprise. *Id.* at 176-77. Certain regulations, however, were found to constitute state action because they required the club to adhere to discriminatory provisions in its constitution and bylaws. The distinction that emerges from the case is that where regulations give impetus to private conduct so as to foster or encourage it, state action will arise.

Similarly, in *Pollak, supra,* the Public Utilities Commission of the District of Columbia approved the practice of piping radio service into buses that were regulated by the commission. Plaintiffs complained that the piping of radio ser-

vice into the buses violated their constitutional rights. Relying particularly on the fact that the Commission approved of the practice, the Supreme Court found a sufficiently close relationship between the federal government and the radio service to make it necessary to consider the alleged constitutional deprivation. 343 U.S. at 462.

We conclude that these cases do not support the contention of the Watson family. The alleged wrong in this case is that the appellees have been permitted to strip mine the Watsons' land. The right to strip mine and the waiver of damages do not originate with the state licensing authority. They have their origin in the "broad form" deed. Thus, Kentucky's environmentally oriented laws and regulations are not aimed at the alleged wrong. Nor do they encourage strip mining. The effect of these laws and regulations is to narrow and restrict appellees' rights under the deed, and, thus, inure to the benefit of the land owner.

The instant case is also readily distinguishable from our decision in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973). In *Palmer*, the defendant was a utility company to which the state granted powers not usually possessed by private corporations. Additionally, the operations of the company were circumscribed fully by an all encompassing system of regulations and statutes, both state, local and administrative. Virtually every one of the company's activities, including the specific activity complained of, were regulated. In view of these factors, we held that the state had injected itself into a position of interdependence with the company so that it was a joint participant. *Id.* at 165. On the contrary, the state in the present case has not even approached joint participation with the coal companies.

We do not find a sufficiently close relationship between the alleged wrong in this case and Kentucky's environmental laws. Accordingly, we hold that the issuance of a permit to

strip mine to a private coal company for the purpose of enforcing that state's environmental policy is not such state action as would support a claim under 42 U.S.C. §1983.

In the alternative, appellants argue that the line of Kentucky decisions interpreting a broad form deed so as to authorize strip mining is state action.

Since the decision in *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18 (1948), it has been established that a state's judicial proceedings can be a form of actionable state action. *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) (First Amendment deprivation). This principle has been recognized explicitly in recent Supreme Court decisions. *See, e.g., Moose Lodge, supra*, 407 U.S. at 179.

The distinguishing feature of all of these state action cases, however, is the fact that the aggrieved party was a party to the state court proceedings. In this case, the Watsons were never a party to any state court proceedings wherein the interpretation of their broad form deed was at issue. They have proceeded upon the theory that it would have been futile to litigate the deed in the Kentucky courts because "in case after case the Kentucky Court has upheld the right of the mineral estate owner to engage in strip mining." We have found no case that even intimates that state action can be premised on a state's common law as applied to different parties and different issues. Were we to accept appellants' argument, we would be, in effect, predicting the outcome in a case where the intent of the parties governed. It may be possible that the factors considered by the Court in *Martin, supra*, 429 S.W.2d at 397-98, which were critical to that decision are not present in this case. We decline to second guess the Court of Appeals of Kentucky.

We think the case at bar is analogous to the recent line of pre-judgment, self help remedy cases. *See, e.g., Bond* v. *Dentzer*, 494 F.2d 302 (2nd Cir. 1974) (self help attachment of

wages); *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1974) (self help repossession of car); *Bichel Optical Laboratories, Inc.* v. *Marquette Nat. Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973) (self help seizure of funds). In each of these cases the seizure of property involved only private actions arising out of written agreements between the parties. The actions were, however, authorized under state law. The courts refused to find state action based on the mere passage of laws by state legislatures authorizing the agreements. In none of these cases were the parties involved in judicial proceedings. Analogously, in the case at bar the right to strip mine and the waiver of damages are derived from a private agreement, and the Watsons have not been a party to any state proceedings.

We decline to expand the state action concept to embrace a line of state court decisions in transactions unrelated to the one at bar.

We are cognizant of the environmental problems associated with strip mining and are sympathetic with the plight of the Watson family. However, this court is not a super legislature and has no power to act in the absence of jurisdiction. The remedy lies with the legislature and the courts of Kentucky. Two justices of the Court of Appeals of Kentucky have expressed strong views to the effect that the decisions of that court contruing the 1905 broad form deed should be overruled. See dissenting opinion of Mr. Justice Edward P. Hill, concurred in by Mr. Justice James B. Milliken, in *Martin* v. *Kentucky Oak Mining Co.*, *supra*, 429 S.W.2d at 400.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Filed 9/25/73

CIVIL ACTION NO. 1603

MITCHELL WATSON, ET AL. PLAINTIFFS

VS:

KENLICK COAL COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

This action is before the Court on defendants' Motion to Dismiss the Complaint for lack of subject matter jurisdiction, Rule 12(b), F.R.C.P. The question has been argued and briefed by counsel. It is the opinion of the Court that the Motion to Dismiss should be sustained for the reasons which follow.

Plaintiffs are private citizens who claim that destruction of surface rights owned by them in Magoffin County, Kentucky incident to the defendants' past and prospective strip mining of mineral owned by defendants, is actionable in the United States District Court for the Eastern District of Kentucky. Plaintiffs have asserted three gounds for federal jurisdiction. Diversity jurisdiction is asserted under 28 U.S.C. 1331(a) but fails upon the allegations of the Complaint that two of the plaintiffs and all of the defendants are residents and citizens of Kentucky which precludes the diversity required by 28 U.S.C. 1331(a). The plaintiffs seek jurisdiction under 28 U.S.C. 2201 and 2202. These declaratory judgment provisions create a remedy but do not of themselves afford federal jurisdiction. *American Airlines,*

Inc. v. *Louisville and Jefferson County Air Board*, 269 F.2d 811 (6th Cir. 1959). Finally, jurisdiction is sought under 42 U.S.C. 1983 and 1984. Section 1983 is a jurisdictional statute and will be considered.

The purpose of enacting 42 U.S.C. 1983, as stated in *Mitcham* v. *Foster*, 407 U.S. 225, 242 (1972), was to

> "interpose the federal courts between the States and the people, as guardians of the people's *federal* rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial . . .'." (Emphasis supplied.)

Moreover, this Court is sensitive to the teaching of *Hilliard* v. *Williams*, 465 F.2d 1212 (6th Cir. 1972), cert. denied 409 U.S. 1029 (1972), although stated in terms relevant to dismissal for failure to state a claim. Nevertheless, it does not appear that plaintiffs have established the essentials required by 42 U.S.C. 1983 for federal jurisdiction.

This case presents another chapter in the continuing debate in Kentucky over the so-called "broad form" mineral deed. The history of this debate is substantially recited in *Roberts* v. *Twin Fork Coal Company*, 223 F.Supp. 752 (E.D. Ky. 1963). Although the defendants are not alleged to have acted under color of state law in the alleged deprivation of plaintiffs' rights, the Court of Appeals of Kentucky and the Kentucky Division of Reclamation are specifically cited as being involved in plaintiffs' alleged loss. The applicable language of the Complaint states:

> "The Kentucky Court of Appeals' decision, Martin v. Kentucky Oak Mining Company, 429 S.W.2d 395 (1968) . . . constitutes state action violative of the due process of law provision of the Fifth Amendment to the United States Constitution in that the Kentucky Court of Appeals has unconstitutionally involved itself in the taking of PLAINTIFF'S (sic) property without just com-

pensation and without due process of law." (Complaint, paragraph 21.)

and,

> "The issuance of the mining permits to the defendants . . . by the Kentucky Division of Reclamation is state action violative of the due process of law provision of the Fifth Amendment to the United States Constitution . . . in that the Kentucky Division of Reclamation as a state agency, has unconstitutionally involved itself in the taking of PLAINTIFF'S (sic) property without just compensation and without due process of law." (Complaint, paragraph 20.)

Plaintiffs apparently desire to raise two aspects of the Fifth Amendment—deprivation of property without due process and the taking of property for a public use without just compensation—through the conduit of the Fourteenth Amendment making such constitutional standards applicable to actions of the Commonwealth of Kentucky. This procedure is viable and does not require the citation of supporting authority.

Plaintiffs do not plead the taking of property for a public purpose, merely the taking of property. Accordingly, the sole Fifth Amendment question is the deprivation of property without due process of law. To establish federal jurisdiction arising out of conduct between private parties it is imperative that state involvement to a significant degree be established. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Plaintiffs urge the argument that the line of decisions of the Kentucky Court of Appeals culminating with *Martin* v. *Kentucky Oak Mining Company*, Ky., 429 S.W.2d 395 (1968), upholding the so-called "broad form" mineral deed as it is construed to permit strip mining without payment to the surface owner for damages except where resulting from oppressive, arbitrary, wanton, or malicious action, is an unconstitutional act on the

part of the Kentucky Court for the reason that it involves the Court in the impermissible taking of plaintiffs' property without due process of law. Regrettably, neither by argument nor brief have plaintiffs enlightened this Court on the workings of this theory. Effort has been made to find a sufficiently close nexus between the official acts of a state court of last resort as to different issues and parties from those presented in this Court upon which plaintiffs' theory might rest. None has been found.

The Fifth Amendment contemplates by judicial construction both procedural due process and so-called substantive due process. There is no basis advanced to this Court upon which other decisions not involving plaintiffs could give rise to a procedural due process argument. Certainly, the *Martin* decision does not touch this issue, or announce any rule impairing plaintiffs' right to a day in Court. It is somewhat difficult to relate the concept of substantive due process to the acts complained of in this Court. The history of the Fifth Amendment would indicate that consideration of due process other than procedural has been principally applied to test alleged arbitrary and unreasonable governmental classifications or judicial acts as to the complaining party. In result, it would appear that the Supreme Court reaches similar conclusions on like reasoning under the Equal Protection Clause of the Fourteenth Amendment to those reached under Fifth Amendment Substantive Due Process. In any event, in the context of a claim of loss of property by lack of due process occasioned by acts of the Court of Appeals of Kentucky involving other persons, there simply is no basis shown to indicate that the Kentucky Court would treat plaintiffs differently from other litigants. If this Court correctly understands plaintiffs' argument, it is precisely because plaintiffs believe they would be treated like other litigants that this question has been raised. If this understanding is

correct, then the argument is rejected out of hand. This Court has no right or duty to speculate on the outcome of possible litigation in the Kentucky Courts.

Were this Court to assume, which it does not, that the *Martin* decision is erroneous, it is clear that a merely erroneous state court decision does not deprive a party of due process of law. *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927). Neither does the concept of federally protected due process of law have as a predicate any assurance of a correct interpretation of the law nor relief from the consequences of an honest misinterpretation. *Thompson* v. *Kentucky*, 209 U.S. 340 (1908). If a party to litigation is bound by these views, then it is difficult to see how a non-party to the litigation would gain any superior rights. It is within the power of the highest court of a state to determine property rights within its jurisdiction under local laws, customs and usages, and this power is not impaired by the Fourteenth Amendment where no federally secured rights are involved. *Tracy* v. *Ginzberg*, 205 U.S. 170 (1907). A reading of *Martin* v. *Kentucky Oak Mining Company, supra*, shows that no federal question was raised or decided. That decision, therefore, stands as duly determined judicial matter in the Kentucky Court of Appeals. This Court has no warrant to question its propriety in this case or power to alter it. Specifically, this Court holds that the Kentucky Court of Appeals did not violate plaintiffs' Fifth Amendment right to due process of law by deciding the line of cases upholding the Kentucky "broad form" mineral deed. This determination sustains the collateral proposition that such Kentucky decisions cannot support a claim of state action within the meaning of 42 U.S.C. 1983.

On similar reasoning the argument fails that issuance of a strip mining permit to the defendants was an unconstitutional act involving the Kentucky Division of

Reclamation in depriving plaintiffs of their property without due process of law. The legislative determination to regulate strip mining in Kentucky as set forth in Chapter 350, Kentucky Revised Statutes and regulations promulgated thereunder was in aid of the objective "to minimize or prevent its injurious effects on the people and resources of the Commonwealth". KRS 350.020. Plaintiffs' due process argument is limited to the issuance of a permit to strip mine. This Court is not advised as to how the issuance of a strip mining permit under the Kentucky scheme of regulating strip mining offends federally secured rights to due process of law. Neither were plaintiffs parties to the procedure, which negates the procedural due process argument, nor is there any allegation that defendants were treated differently than others to plaintiffs detriment; if, under any view, plaintiffs have standing to raise that question. Again, if this Court correctly understands plaintiffs' argument, it arises out of the fact that a permit to strip mine was issued to defendants under any conditions. Although the issuance of the strip mining permit is clearly state action, it is not actionable state action within the meaning of 42 U.S.C. 1983. There is no relationship pled, argued or authority presented to show that the involvement of the state by issuing a permit to engage in a lawful industry under state regulation deprives plaintiffs of property without due process of law within the meaning of the Fifth Amendment.

On the assertion that plaintiffs' surface rights are "taken" by strip mine operations (omitting the conclusive adverb "unconstitutionally"), no federal constitutional question is raised where it is not shown, at least to an arguable degree, that the taking is impermissible under the federal constitution *and* that "state action" is involved. This Court is unable to find the existence of the jurisdictional elements required under 42 U.S.C. 1983.

The Motion to Dismiss is hereby SUSTAINED.

This case shall be stricken from the docket.
IT IS SO ORDERED this 25 day of September, 1973.

/s/ H. David Hermansdorfer, Judge
H. David Hermansdorfer, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Dorothy B. Wood
D. C.

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 9/28/73
DAVIS T. MC GARVEY, CLERK
BY: /s/ Dorothy B. Wood D.C.

APPENDIX C

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION, 1974

HOUSE BILL NO. 9

THURSDAY, FEBRUARY 21, 1974

The following bill was reported to the Senate from the House and ordered to be printed.

AN ACT relating to strip mining.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 350.060 is amended to read as follows:

(1) No operator shall engage in strip mining without having first obtained from the department through the division a permit designating the area of land affected by the operation. The permit shall authorize the operator to engage in strip mining upon the area of land described in his application for a period of one year from the date of its issuance;

(2) An operator desiring a permit shall file an application which shall state:

(a) The location and area of land to be affected by the operation, with a description of access to the area from the nearest public highways;

(b) The owner or owners of the surface of the area of land to be affected by the permit and the owner or owners of all surface area within five hundred (500) feet of any part of the affected area;

(c) The owner or owners of the coal, to be mined;

(d) The source of the applicant's legal right to mine the coal on the land affected by the permit;

(e) The permanent and temporary post office addresses of the applicant;

(f) Whether the applicant or any person, partnership or corporation associated with the applicant holds or has held any other permits under this chapter, and an identification of such permits;

(g) Whether or not the applicant is in compliance with subsection (3) of KRS 350.130 and whether or not every officer, partner, director or any individual owning of record or beneficially (alone or with associates) if known, ten percent (10%) or more of any class of stock of the applicant, is subject to any of the provisions of subsection (3) of KRS 350.130 and he shall so certify;

(3) The application for a permit shall be accompanied by two copies of a United States geological survey topographic map on which the operator has indicated the location of the operation, the course which would be taken by drainage from the operation to the stream or streams to which such drainage would normally flow, the name of the applicant and date, and the name of the person who located the operation on the map;

(4) The application for a permit shall be accompanied by two copies of an enlarged United States geological survey topographic map meeting the requirements of the subsections below. The map shall:

(a) Be prepared and certified by a professional engineer, registered under the provisions of KRS chapter 322. The certification shall be in the form as provided in subsection (5) below;

(b) Identify the area to correspond with the application;

(c) Show adjacent deep mining and the boundaries of surface properties and names of owners on the affected area and within five hundred (500) feet of any part of the affected area;

(d) Be of a scale of not less than four hundred (400) feet to the inch and not to exceed six hundred and sixty (660) feet to the inch;

(e) Show the names and locations of all streams, creeks, or other bodies of public water, roads, buildings, cemeteries, oil and gas wells, and utility lines on the area of land affected and within five hundred (500) feet of such area;

(f) Show by appropriate markings the boundaries of the area of land affected, the cropline of the seam or deposit of coal to be mined, and the total number of acres involved in the area of land affected;

(g) Show the date on which the map was prepared, the north point and the quadrangle name;

(h) Show the drainage plan on and away from the area of land affected. Such plan shall indicate the directional flow of water, constructed drainways, natural waterways used for drainage, and the streams or tributaries receiving the discharge;

(5) The certification of the maps by the professional engineer shall read as follows: "I, the undersigned, hereby certify that this map is correct, and shows to the best of my knowledge and belief all the information required by the strip mining laws of this state." The certification shall be signed and notarized. The division may reject any map as incomplete if its accuracy is not so attested;

(6) In addition to the information and maps required above, each application for a permit shall be accompanied by detailed plans or proposals showing the method of operation, the manner, time and distance for backfilling, grading work and a reclamation plan for the affected area, which proposals shall meet the requirements of this chapter and rules and regulations adopted pursuant thereto;

(7) Each application shall also be accompanied by a statement of consent to have strip mining conducted upon

the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent. This statement of consent shall not be required for coal mined under the provisions of KRS Chapter 351 and KRS Chapter 352.

(8)[(7)] A basic fee of one hundred and fifty dollars ($150) plus thirty-five dollars ($35.00) for each acre or fraction thereof of the area of land to be affected by the operation shall be paid before the permit required herein shall be issued. The operator shall file with the division a bond payable to the commonwealth of Kentucky with surety satisfactory to the division in the penal sum to be determined by the department on the recommendation of the director of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) for each acre or fraction thereof of the area of land affected, with a minimum bond of two thousand dollars ($2,000), conditioned upon the faithful performance of the requirements set forth in this chapter and of the rules and regulations of the department. In determining the amount of the bond within the above limits, the department shall take into consideration the character and nature of the overburden, the future suitable use of the land involved and the cost of backfilling, grading and reclamation to be required. In a particular instance where the circumstances are such as to warrant an exception, the department, in its dis-

cretion, may reduce the amount of the bond for a particular operation to less than the required minimum.

_____

Speaker-House of Representatives

_____

President of The Senate

Attest:_____

Clerk-House of Representatives

Approved _____

Governor

CONFERENCE COMMITTEE
House Bill 9
March 21, 1974

Members of the Senate and House of Representatives met at 10:30 on Thursday, March 21, 1974, to try to come to an agreement on HB 9.

The meeting was called to order and Senator Gibson was elected chairman of the committee.

After much discussion, there was a unanimous consent of the committee that the following recommendations be made to both houses for concurrence:

(1) Recommend deletion of Senate Amendments No. 1, 2, and 3.

(2) Recommend the following amendment to HB 9:

on page 1, after the enacting clause and before line 1 by inserting the following:

"Section 1. It is the intent of the General Assembly in this Act to declare that the notarized statement of consent

required by Section 2 of this Act is a perfectly legitimate, right, and proper requirement to protect the public safety and welfare as it pertains to the broad form deed. It is also the intent of the General Assembly that this Act does not affect any other form of contract in any manner, nor affect underground mining in any manner."

and on page 6, after line 2, by adding the following:

"Section 3. This Act shall become effective January 1, 1975."

and on page 1, line 1, by renumbering "Section 1" as "Section 2".

[Signed by Senators Gibson, Farris, Stacy and Nard, and Representatives Overstreet, Reynolds and McBee]